No. _____

In The

Supreme Court of the United States

WILLIAM D. AMOS,

Petitioner,

v.

VIRGINIA EMPLOYMENT COMMISSION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM D. AMOS
Pro Se Petitioner
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QUESTIONS PRESENTED

1. Whether the Federal Rules of Civil Procedure allow a Court of Appeals to uphold a decision of a District Court using the analysis of that District Court, when that District Court provided no decision on the merits or any analysis on an issue initially raised on a Motion for Leave to Amend and Later on a Motion for Reconsideration and/or for Clarification of a previous ruling.

2. Whether it is proper for a Court of Appeals to uphold a District Court's order granting a summary judgment motion when on the face of the pleadings there still exists a viable claim; where discovery had taken place on that claim and pending discovery remained on that claim.

LIST OF PARTIES

The Petitioner is William Amos, a resident of Halifax County, Virginia. The Respondents are the Virginia Employment Commission (VEC), an agency of the Commonwealth of Virginia. Dolores Esser, Commissioner of the VEC; Bill Jacobs, Assistant Commissioner for Filed Operations for the VEC, Woody Tucker, Chief of Benefits for the VEC; Aundy Holland, Regional Director of the VEC; Linda Daniel, Field Office Manager of the VEC; Kristina Skeldon, Assistant Field Office Manager/Hearing Officer for the VEC; Diane Wilmouth, Assistant Field Office Manager; Sally Henderson, Hearing Officer for the VEC; and Barbara Weeks Smith, Hearing Officer for the VEC.

OPINIONS BELOW

The opinion of the Court of Appeals dated August 17, 2006 can be found at App. p.1. The September 23, 2005 judgment of the District Court can be found at App. p.6. The August 19, 2005 judgment of the District Court can be found at App. p.6. The Court of Appeals denial for rehearing can be found at App. p.15.

JURISDICTION

The court of appeals decision denying the petitioner's petition for rehearing *en banc* was entered on October 3, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The United States District Court for the Western District of Virginia had jurisdiction pursuant to 42 U.S.C. § 2000e-5. A motion was pending asking the District Court to take jurisdiction pursuant to 42 U.S.C. § 1981 *et seq.*

STATUTES AND REGULATIONS INVOLVED IN THE CASE

This case involves the application of the Federal Rules of Civil Procedure with regards to Motions for Leave to Amend (Rule 15), Summary Judgment (Rule 56), and Motions for Clarification of a previous ruling or judgment (Rules 59 and 60).

STATEMENT OF THE CASE

On January 10, 2005 a complaint was filed in the United States District Court for the Western District of

Virginia under 42 U.S.C. § 2000e-5. After the initial filing of the complaint the defendant filed a Motion to Strike, which was granted as to the individual defendants. Plaintiff then sought leave to amend his complaint, which sought, among other things, to add the individual defendants in their individual capacities, as well as in their official capacities (which was done in the original complaint). In addition, the plaintiff was asking for leave to amend his complaint to add jurisdiction pursuant to 42 U.S.C. § 1981 *et seq.* and an unfair hiring practices claim. The Motion for Leave to Amend was denied, but never specifically addressed the unfair hiring practice claim or the 42 U.S.C. § 1981 *et seq.* claim. A Motion for Clarification and/or Reconsideration was filed asking the district court to address the two claims, but again the two issues were never addressed. The Court of Appeals affirmed based on the reasoning of the District Court. A Petition for Rehearing and Rehearing *en banc* was denied on October 3, 2006.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Decisions Below Are In Conflict With The Federal Rules Of Civil Procedure And Other Circuit Courts Of Appeals.

There seems to be a heightened pleading and burden of proof requirements placed on pro se litigants in the Fourth Circuit, especially in Title VII actions. This is especially true in this case. While the pleadings named the individual defendants in their official capacities, the District Court refused to allow leave to amend to allow for the individual defendants to be named in their individual capacities. In addition, the District Court never squarely

addressed the issues of whether the complaint could proceed on a 42 U.S.C. § 1981 *et seq.* claim and an unfair hiring practices claim.

When the Court of Appeals adopted the reasoning of the District Court in affirming the District Court's ruling in denying leave to amend it also never squarely addressed the issues raised in the Petitioner's Motion for Leave to Amend and in the Motion for Clarification and/or Reconsideration. While the petitioner could not find a Fourth Circuit case directly on point, the First Circuit case of *Colon-Santiago v Rosario*, 438 F.3d 101, 112 (2006) provides a basis for remand of a case where at least one legal issue has not been squarely addressed by the district court. In addition, this case holds that a litigant is entitled to a decision on the merits. *Id.* at 101. In this case no analysis has been provided by the district court or the court of appeals and therefore conflicts with procedure established in another circuit. In essence this petition asks this court to vacate the decisions below and remand for a determination on the merits. The very foundation on which our due process rights rest requires a decision on the merits. The lower courts rulings are inconsistent with our tradition of jurisprudence based on the rule of law and the doctrine of *stare decisis*.

II. The Fourth Circuit's Decision Upholding The District Court's Granting Of Summary Judgment Erroneously Places The Burden Of Proof On The Non-Moving Party.

The granting of summary judgment is problematic for two reasons. First, the district court admits part of the petitioner's deposition, which conflicts with Fed. R. Civ. P. 5(d), which requires the filing of the entire document when

it is used in the proceedings. In addition, the defendant and his court reporter did not allow for review by the petitioner (review which was requested by the petitioner at the deposition), which is in conflict with Fed. R. Civ. P. 30.

Second, the initial complaint entitled the claim "discriminatory use of the performance appraisal system and retaliation." The use of the word "and" suggests two claims. The dismissal of the retaliation claim, even if proper, would still have left the performance appraisal claim. Since discovery was initiated on the performance appraisal claim and pending discovery remained on the performance appraisal claim, to summarily dismiss and not allow this case to proceed to trial was inconsistent with the Federal Rules of Civil Procedure's liberal pleading requirements and the rules on summary judgment.

CONCLUSION

For the reasons as outlined above the Petitioner respectfully request that this court grant *certiorari.*

Respectfully submitted,

WILLIAM D. AMOS
Pro Se Petitioner

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 05-2226

WILLIAM D. AMOS,

Plaintiff – Appellant,

versus

VIRGINIA EMPLOYMENT COMMISSION; DOLORES ESSER, Commissioner, Virginia Employment Commission; BILL JACOBS, Assistant Commissioner for Field Operations, Virginia Employment Commission; WOODY TUCKER, Chief of Benefits, Virginia Employment Commission; AUNDY HOLLAND, Regional Director, Virginia Employment Commission, Petersburg/Tri-Cities Field Office; LINDA DANIEL, Field Office Manager, Virginia Employment Commission, South Boston Field Office; KRISTINA SKELDON, Assistant Field Office Manager/Hearing Officer, Virginia Employment Commission, Farmville Field Office; DIANE WILMOUTH, Assistant Field Office Manager, Workforce Services Representative, Virginia Employment Commission, South Boston Field Office; SALLY HENDERSON, Hearing Officer, Virginia Employment Commission, Lynchburg Field Office; BARBARA WEEKS SMITH, Hearing Officer, Virginia Employment Commission, Danville Field Office,

Defendants – Appellees.

Appeal from the United States District Court for the Western District of Virginia, at Danville. Jackson L. Kiser, Senior District Judge. (CA-05-5-JLK)

Submitted: July 21, 2006 Decided: August 17, 2006

Before WILKINSON and SHEDD, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

William D. Amos, Appellant Pro Se. Ronald Nicholas Regnery, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

PER CURIAM:

William D. Amos appeals the district court's orders denying Amos' motion to amend, granting Appellees' motion for summary judgment, and denying Amos' motions for reconsideration in this civil action against his former employer and several individual defendants. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Amos v. Virginia Employment Comm'n,* No. CA-05-5-JLK

(W.D. Va. July 13, Aug. 19 & Sept. 23, 2005). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

JUDGMENT

FILED: August 17, 2006

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 05-2226
CA-05-5-JLK

WILLIAM D. AMOS

Plaintiff – Appellant

v.

VIRGINIA EMPLOYMENT COMMISSION; DOLORES ESSER, Commissioner, Virginia Employment Commission; BILL JACOBS, Assistant Commissioner for Field Operations, Virginia Employment Commission; WOODY TUCKER, Chief of Benefits, Virginia Employment Commission; AUNDY HOLLAND, Regional Director, Virginia Employment Commission, Petersburg/Tri-Cities Field Office; LINDA DANIEL, Field Office Manager, Virginia Employment Commission, South Boston Field Office; KRISTINA SKELDON, Assistant Field Office Manager/Hearing Officer, Virginia Employment Commission, Farmville Field Office; DIANE WILMOUTH, Assistant Field Office Manager, Workforce Services Representative, Virginia Employment Commission, South Boston Field Office; SALLY HENDERSON, Hearing Officer, Virginia Employment Commission, Lynchburg Field Office; BARBARA WEEKS SMITH, Hearing Officer, Virginia Employment Commission, Danville Field Office

Defendants – Appellees

Appeal from the United States District Court
for the Western District of Virginia at Danville

In accordance with the written opinion of this Court filed this day, the court affirms the judgment of the District Court.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

WILLIAM D. AMOS, Plaintiff, v. VIRGINIA EMPLOYMENT COMMISSION, et al., Defendants.	)	Case No. 4:05CV00005 **MEMORANDUM OPINION** By: Jackson L. Kiser Senior United States District Judge

On August 19, 2005, this Court entered an Order granting Defendant Virginia Employment Commission's ("VEC") Motion for Summary Judgment. Before me now is Plaintiff William D. Amos' ("Amos") Motion for Reconsideration, to Alter, or Amend Judgment. For the reasons set forth below, I hereby **DENY** Amos' Motion.

I. PROCEDURAL BACKGROUND

Amos brought suit against VEC on January 10, 2005 alleging both a hostile work environment claim and a retaliation claim under Title VII of the Civil Rights Act of 1964. On April 22, 2005, this Court granted VEC's Motion to Dismiss Amos' hostile work environment claim. This Court later denied Amos' Motion to Amend his Complaint in which he attempted, *inter alia,* to re-allege a hostile work environment claim. Ultimately, this Court held a hearing on August 11, 2005 regarding VEC's Motion for Summary Judgment and Amos' Motion to Reconsider denying his Motion to Amend. On August 19, 2005, this Court denied Amos' Motion as untimely and granted VEC's Motion. On August 29, 2005 Amos filed a Motion for

Reconsideration, to Alter, or to Amend a Judgment and/or for Clarification of the Court's Memorandum Opinion. VEC filed its Brief in Opposition on September 12, 2005 and Amos filed his Reply on September 20, 2005. In his Reply, Amos waived oral argument, thus the issues are now ripe for decision.

II. STANDARD OF REVIEW

Any motion to alter or amend a judgment must be filed no later than 10 days after entry of the judgment. Fed. R. Civ. P. 59(e). The Fourth Circuit has recognized that "while the Rule itself provides no standard for when a district court may grant such a motion, courts interpreting Rule 59(e) have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." *Bogart v. Chappell,* 396 F.3d 548, 555 (4th Cir. 2005) (citations omitted)). As such, it is inappropriate to use a Rule 59(e) motion "to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." Wright, Miller, and Kane, 11 *Federal Practice & Procedure,* § 2810.1 (2d ed. 1995, p. part 2005), 126-128 *(citing, among others, Pacific Ins. Co. v. American Nat. Fire Ins. Co.,* 148 F.3d 396, 403 (4th Cir. 1998), *cert. denied,* 525 U.S. 1104)).

III. DISCUSSION

Amos raises two bases for reconsideration in his Motion, neither of which have merit. The first basis argues that it would be a "manifest injustice to allow this summary

judgment ruling to survive in light of pending discovery motions." (Amos Brief in Support, pg. 4). However, no injustice whatsoever can exist for Amos because the discovery motions were rendered moot after oral argument between the parties before this Court on August 11, 2005. Indeed, on August 12, 2005 VEC sent a letter to Amos and the Court attempting to confirm that the discovery motions were moot. Amos never protested the content of VEC's letter which clearly suggests that he, too, understood the discovery motions to be moot. Thus, Amos' first basis for reconsideration is denied.

Amos' second basis for reconsideration is that the Court's entry of Summary Judgment only covered Amos' retaliation claim without speaking to his separate claim regarding VEC's discriminatory performance appraisal system (Amos Reply Brief, pgs. 2-3). Amos argues that Count 1 of his Complaint entitled "Discriminatory Use of the Performance Appraisal System and Retaliation" (Amos Complaint, pg. 4 ¶¶ 14-15) raises two separate claims. Amos does not cite any of the appropriate grounds for reconsideration under Rule 59(e) and none appear anywhere in the record. Regardless, there is little to suggest that Amos intended to raise two separate claims in Count 1. In fact, Amos apparently never tried to distinguish between the act of retaliation and the method of retaliation (the performance appraisal system) until this Court entered Summary Judgment against his retaliation claim.

Lastly, Amos seeks clarification on the status of his hostile work environment claim. As noted above, this Court dismissed Amos' hostile work environment claim on April 22, 2005. Amos later attempted to reinsert a hostile work environment claim in his proposed Amended Complaint but his Motion to Amend was denied by this Court

on July 15, 2005. Amos' hostile work environment claim, therefore, remained and remains dismissed with prejudice.

IV. CONCLUSION

In summary, for the reasons stated above, I will **DENY** Amos' Motion for Reconsideration, to Alter, or to Amend Judgment. The clerk is directed to send a copy of this Memorandum Opinion to all counsel of record. An appropriate Order shall this day issue. Entered this 23rd day of September, 2005.

/s/ Jackson L. Kiser
Senior United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

WILLIAM D. AMOS, Plaintiff, v. VIRGINIA EMPLOYMENT COMMISSION, et al., Defendants.	Case No. 4:05cv00005 **MEMORANDUM OPINION** By: Jackson L. Kiser Senior United States District Judge

Before me are Plaintiff's Motion for Reconsideration, to Alter, or Amend Judgment [44] and Defendants' Motion for Summary Judgment [46]. The parties have briefed the issues and oral argument was held on August 11, 2005. The motion is therefore ripe for decision. For the reasons set forth below, I hereby **DENY** Plaintiff's Motion for Reconsideration and **GRANT** Defendants' Motion for Summary Judgment.

I. BACKGROUND

William D. Amos ("Plaintiff") was an employee of the Virginia Employment Commission ("VEC") from May 17, 2002 until his termination on July 3, 2003. Plaintiff filed a Charge of Discrimination against the VEC with the Equal Employment Opportunity Commission ("EEOC") on January 29, 2004. The EEOC dismissed the charge on October 14, 2004. Plaintiff then filed suit in this Court against the VEC and various VEC employees ("Defendants," collectively) on January 10, 2005. The suit was based on two claims: retaliation and hostile work environment. The Court dismissed the hostile work environment

claim on April 22, 2004, leaving only the retaliation claim. Plaintiff subsequently filed a Motion for Leave to Amend and File a Supplemental Complaint which the Court denied on July 15, 2005, and is now the subject of Plaintiff's present Motion for Reconsideration. On July 25, 2005, Defendants' filed their Motion for Summary Judgment on the remaining retaliation claim.

II. PLAINTIFF'S MOTION FOR RECONSIDERATION, TO ALTER OR AMEND JUDGMENT

A. Discussion

Plaintiff's Motion is brought pursuant to both Rule 59 and Rule 60 of the Federal Rules of Civil Procedure. While the Court is well aware of Plaintiff's *pro se* status, his Motion is simply untenable under either Rule 59 or Rule 60 due to the fact that Motions made pursuant to these rules may only be made in response to final judgments. *See Fayetteville Investors v. Commercial Builders Inc.*, 936 F.2d 1462, 1469 (4th Cir. 1991). Plaintiff's Motion seeks reconsideration of this Court's denial of his Motion for Leave to Amend, an interlocutory order. Therefore, reconsideration of this order under Rules 59 or 60 is inappropriate and Plaintiff's Motion will be denied. Moreover, the Motion raises no new issues. It neither cites any change in the law or facts that were not available at the time of the Court's original decision. It is not the function of a Motion for Reconsideration to rehash that which has already been decided.

III. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Standard of Review

Summary judgment is appropriate where no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of a material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247-48 (1986). In making this determination, "the court is required to view the facts and draw reasonable inferences in a light most favorable to the nonmoving party." *Shaw v. Stroud,* 13 F.3d 791, 798 (4th Cir. 1994) (citations omitted), *cert. denied,* 513 U.S. 813 (1994); *Felty v. Graves-Humphreys Co.,* 818 F.2d 1126, 1129 (4th Cir. 1987). Nevertheless, where the record taken as a whole cannot lead a rational trier of fact to find for the nonmoving party, no genuine issue exists for trial and summary judgment is appropriate. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

B. Discussion

Defendants' Motion addresses Plaintiff's sole remaining claim of retaliation arguing that it fails as a matter of law because Plaintiff cannot establish a *prima facie* case of retaliation. I agree. To prove a *prima facie* case of retaliation under Title VII, a plaintiff must show that he engaged in a protected activity, that the employer took an adverse employment action against him, and that there is a causal link between the adverse action and the protected activity. *See Karpel v. Inova Health Sys. Servs.,* 134 F.3d 1222, 1228 (4th Cir. 1998). It is axiomatic that this

final requirement of a causal link necessitates that the protected activity take place *prior to* the adverse employment action. Plaintiff claims that his employment with the VEC was terminated in retaliation for his speaking with DHRM investigator concerning a complaint of discrimination filed by a former co-worker at the VEC, Sophia Jones ("Jones"). However, assuming Plaintiff could establish that this conversation with the investigator constitutes a "protected activity," the record clearly reflects that the conversation did not take place until *after* his employment was terminated. (Amos Dep., 7/19/05, p. 196, ll. 12-18; p. 199, ll13-18). Therefore, there can be no causal connection between his termination and the "protected" conversation simply because the former preceded the latter.

In response, Plaintiff argues that his work performance was satisfactory and offers as support affidavits of both himself and co-workers. As an initial matter, the overwhelming majority of evidence in this case indicates that Plaintiff's job performance was in fact unsatisfactory. And although he was provided numerous opportunities to improve, he was never able to reach the requisite levels of performance necessary to carry him beyond probationary status. The affidavits offered by the Plaintiff speak to the contrary, however I find them to be wholly unpersuasive. Plaintiff's affidavit relating his own opinion of his work performance is irrelevant. In a wrongful discharge action, "it is the perception of the decision maker that is relevant, not the self-assessment of the plaintiff." *Hawkins v. Pepsico, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000) (internal citation omitted). Similarly the affidavits of his co-workers hold no persuasive value namely because none of them held supervisory roles with relation to Plaintiff. *See id.* But most importantly, the issue of Plaintiff's work

performance is wholly unrelated to the merits of his retaliation claim; this Plaintiff concedes by claiming that he was terminated not for his actions on the job, but for his conversation with DHRM which took place after he was fired. Therefore, I find Plaintiff's arguments unpersuasive and will grant Defendants' Motion on the remaining claim for retaliation.

CONCLUSION

For the reasons stated above, Plaintiff's Motion for Reconsideration, to Alter or Amend Judgment is **DENIED** and Defendants' Motion for Summary Judgment is **GRANTED**.

Entered this 19th day of August, 2005.

s/ Jackson L. Kiser
Senior United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
October 3, 2006

No. 05-2226
CA-05-5-JLK

WILLIAM D. AMOS

Plaintiff – Appellant

v.

VIRGINIA EMPLOYMENT COMMISSION; DOLORES ESSER, Commissioner, Virginia Employment Commission; BILL JACOBS, Assistant Commissioner for Field Operations, Virginia Employment Commission; WOODY TUCKER, Chief of Benefits, Virginia Employment Commission; AUNDY HOLLAND, Regional Director, Virginia Employment Commission, Petersburg/Tri-Cities Field Office; LINDA DANIEL, Field Office Manager, Virginia Employment Commission, South Boston Field Office; KRISTINA SKELDON, Assistant Field Office Manager/Hearing Officer, Virginia Employment Commission, Farmville Field Office; DIANE WILMOUTH, Assistant Field Office Manager, Workforce Services Representative, Virginia Employment Commission, South Boston Field Office; SALLY HENDERSON, Hearing Officer, Virginia Employment Commission, Lynchburg Field Office; BARBARA WEEKS SMITH, Hearing Officer, Virginia Employment Commission, Danville Field Office

Defendants – Appellees

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

Entered for a panel composed of Judge Wilkinson, Judge Shedd, and Senior Judge Hamilton.

For the Court,

/s/ Patricia S. Connor
CLERK